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BRIEF OF *AMICI CURIAE* COMMONWEALTH OF VIRGINIA

The the Commonwealth of Virginia ("the *Amici* State") submits this brief as *amici curiae* in support of the American Trucking Association, Inc. and the States of Michigan, Ohio, and West Virginia. The *Amici* State supports the affirmation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999), which remanded the Environmental Protection Agency's ("EPA's") revised national ambient air quality standards ("NAAQS") for ozone and fine particulate matter.[1]

INTRODUCTION

This is not a case about whether cleaner air should be a national priority. The Amici State agrees that it must be, and Congress has so declared it. Instead, this is a case about how the standards for cleaner air shall be set. Are federal regulators to have unlimited discretion to set whatever arbitrary standards they wish? Or shall they be held accountable for what they do by being required to explain their decisions and base them on facts? More specifically, this case is a contest between two competing constructions of the key provision of the Clean Air Act, section 109, under which EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of

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[1] This brief focuses on the ozone rulemaking. In the relating particulate matter proceeding before the court of appeals, the court held also that EPA violated the nondelegation doctrine. The *Amici* further supports the court's holding in this regard and believe that it dictates a similar conclusion in this case.

safety, [as] are requisite to protect the public health." 42 U.S.C. § 7409(b). Presented with two possible interpretations of § 109 - one that allows EPA unconfined and limitless discretion to alter the NAAQS and one that affords "intelligible principles" upon which to base such a change - the court of appeals was correct in adopting the latter. That is, the court was wholly justified in forcing EPA to explain its decision to revise air quality standards in such a manner as to facilitate a court's review.

INTEREST OF AMICUS CURIAE

The protection of public health and the environment is of manifest importance to the Commonwealth. In the furtherance of this policy, it fully supports strict regulation of air pollutants which threaten these interests. Congress established under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA"), a unique federal-state partnership for controlling air pollution. Under this partnership, EPA sets and revises the NAAQS under § 109; the States maintain primary responsibility for achieving these standards. CAA §§ 107-110; 42 U.S.C. §§ 7407-7410.

The Commonwealth has a unique interest in ensuring that the § 109 is construed in a way that best protects the public health and welfare of Virginians as well as their social and economic well being. It also strongly believes that the statute must be construed to uphold Congress' federal-state partnership. The Commonwealth is uniquely positioned to provide public law and policy arguments on these points on behalf of its citizens.

EPA's decisions in this case upset this federal-state partnership. EPA set new air quality standards without adequately articulating the health and environmental benefits of such action. While the benefit to health is not clear, there is no doubt that EPA's action would have vast and far ranging consequences to the welfare of all Virginians. And,

as the State partner under the Act, it is left to enforce such standards which may have been altered without adequate justification.

This amicus brief is submitted under S. Ct. Rule 37, which allow the States to file such briefs without permission of the parties and without leave of court.

STATEMENT OF FACTS

The parties have submitted lengthy briefs setting forth the detailed statutory and factual background of this case. The Commonwealth will not repeat that background here. It is necessary, however, to draw attention to facts which underscore the impact of EPA's standardless rulemaking in this case.

In the 1990 Amendments to the Clean Air Act, Congress revised the air quality standard for ozone at .12 part per million ("ppm"). 42 U.S.C. § 7511(a).[2] Ozone, unlike many other pollutants, is not directly emitted by sources. Instead, it is formed from the mixture of two chemical precursors, nitrogen oxides ("NOx") and a group of hydrocarbon pollutants called volatile organic compounds ("VOCs").[3]

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[2] As a result, States made designations for areas that did not meet the Congress' standard ("nonattainment areas") and EPA designated approximately 100 areas in the country as nonattainment for ozone. 56 Fed. Reg. 56694 (November 6, 1991). Congress included in its Amendments specific attainment deadlines for these areas; those deadlines are keyed to whether areas were classified as either "marginal," "moderate," "serious," "severe," or "extreme." CAA § 181(a)(1); 42 U.S.C. § 7511(a)(1).

[3] These precursors cook in the sun, during hot weather, and produce ozone through a complex chain of chemical reactions. The creation of ozone is a seasonal phenomenon, with concentrations peaking in the summer, and as a diurnal occurrence, with concentrations peaking during the afternoon and

These precursors originate from a wide variety of natural and man-made sources. Indeed, they come from virtually every facet of modern American life, including operating automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants.

Congress' ozone scheme has been quite effective in reducing ozone levels throughout the United States. According to EPA data, between 1987 and 1996, ambient ozone concentrations in the United States decreased by 15 percent; exceedances of the NAAQS decreased by 73 percent. Office of Air Quality Planning and Standards, EPA, National Air Quality and Emissions Trends Report, 1996, EPA Doc. NO. 454/R-97-013, http://www.epa.gov/oar/aqtrnd96/trendsfs.html.

Virginia's air quality has greatly improved under Congress' mandate. In the early 1990s, Virginia designated eleven counties and seventee cities in nonattainment for the ozone NAAQS. VR 120-01, Appendix K, January 1, 1992. Today, only the five counties and five cities in Northern Virginia, surrounding Washington D.C., are in nonattainment. 9 VAC 5-20-204.

Against this backdrop of improving air quality, EPA adopted new and far more stringent air quality standards for ozone, reducing allowable levels from the .12 ppm standard to .08 ppm measured over an 8-hour period. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,855 (July 18, 1997). EPA did so without pinpointing specific health benefits, if any, of this radical change or demonstrating why the change was required. EPA found it hard to differentiate health benefits associated with this new standard or to demonstrate the elimination of a

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falling during the night. *See Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997).

significant risk to public health. The Clean Air Scientific Advisory Committee ("CASAC"), upon which EPA relies in setting air standards, advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, regarding CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone at 3 (November 30, 1995). It even highlighted a particular study demonstrating "small" health differences between "outdoor" children exposed to ozone at the existing .12 standard and those exposed to ozone at levels even more stringent that the .08 standard at issue. *Id.* In fact, CASAC was divided as to what ozone standard to adopt; a majority of the members supported a standard less stringent than .08 ppm. National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,728 (December 13, 1996).

Moreover, EPA seemingly ignored other important public health information relevant to ozone. For example, EPA acknowledged that, due to ozone's screening effect on harmful ultraviolate radiation, the reduction in ozone levels mandated by its new standard will increase malignant and nonmelanoma skin cancers and cataracts. EPA, Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers (Draft September, 1994). The Department of Energy predicted literally thousands of new cases of skin cancer and cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995).

As a result, EPA offered only vague references to "the nature and severity" of health effects, "the size of the sensitive population(s) at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35, citing Ozone Final Rule, 62 Fed. Reg. at 38,883. In short, EPA's decision is not based on science. *See* Proposed Rule, 61 Fed. Reg. at 65727.

While there is not clear health benefit, there is no doubt that this rulemaking would have vast and far ranging consequences. Nationwide, the new standard will place 20% of American counties into nonattainment. Brobeck, Phleger & Harrison LLP, Science and the High Cost of Cleaner Air, October 19, 1997. EPA's own regulatory impact analysis estimates the overall cost of complying with the NAAQS to be $9.6 billion annually. Innovative Strategies and Economics Group, EPA, Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-12 (1997). By contrast, EPA estimates total yearly benefits from compliance at between $1.5 and $8.5 billion. *Id.* at ES-17. Other studies are not so conservative. The American Petroleum Institute estimates the cost of achieving the new NAAQS ranging from $2.5 to 7.0 billion *in the Chicago metropolitan area alone*. The Monetary Benefits of An 8-Hour 0.08 ppm Ozone Standard in Chicago, Research Study # 085, August, 1996. Another study suggests costs of $40 to $60 billion per year. Science and the High Cost of Cleaner Air, Brobeck, Phleger & Harrison LLP, October 19, 1997.

In Virginia, preliminary projections indicate that 17 counties and 21 cities will be in nonattainment under the .08 standard, including all of its major metropolitan areas. This portends profound economic and social consequences for the Commonwealth and its citizens.

In practical terms, States, which must implement the new standard,[4] will be required to limit emissions from "sources,"

[4] Once EPA revises an air standard, the Act requires that the Commonwealth develop and submit to EPA a state implementation plan ("SIP") under which it will implement, maintain and enforce the new standard. CAA §110(a)(1); 42 U.S.C. 7410(a)(1). The SIP must "include enforceable emission limitations and other control measures, means, or techniques

including automobiles, trucks, buses, trains, manufacturing facilities, refineries, and electrical power plants. A manufacturing plant, for example, may be forced to reduce emissions to meet State requirements by shifting capital from plant expansion to the purchase of advanced technology pollution control equipment or by reducing its hours of operation. CAA §§ 108(a)(2)(A), (b)(2); 42 U.S.C. §§ 7408(a)(2)(A), (b)(2). Either option could cost workers jobs and result in higher prices for consumers. An electric utility may be forced to reduce emissions by changing its fuel source to cleaner burning coal imported from outside the region, thus driving up prices for consumers. Ordinary citizens may be required to reduce automobile emissions by submitting to emissions testing and making expensive equipment upgrades for older models. CAA §§ 182(a)(2)(B)(i), (b)(4), (c)(3); 42 U.S.C. §§ 7511. In some cases, States may even be required to institute transportation control measures to offset growth or bring emissions within projected levels. CAA §§ 182 (c)(5, (d)(1)(A); 42 U.S.C. §§ 7511a. That is, citizens may be required to curtail automobile travel and the use of recreational vehicles and other mechanized equipment. In addition, in nonattainment areas, businesses are unable to locate or expand unless new emissions are offset by reductions elsewhere. *See* CAA §§ 182(a)(4), (b)(5), (c)(10) (d)(2), (e)(1); 42 U.S.C. § 7511. Faced with a choice between locating in a nonattainment or attainment area, businesses will pass by the nonattainment area in favor of other areas. Whole communities will be shackled from development, stunting growth, development, and quality of life for its citizens.

(including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act." CAA §110 (a)(2)(A); 42 U.S.C. 7410(a)(2)(A).

The costs are even higher under the Act if a State fails to implement such measures in nonattainment areas. The Act allows the Administrator to choose between cutting of federal highway funds and imposing additional emission offset requirements for new source permits. CAA § 179; 42 U.S.C. § 7509. One estimate suggests that 72% of highway construction jobs in Virginia would be threatened by such sanctions and $311,000,843 in highway funds are at stake. Economic Impact of Proposed EPA Ozone and PM Standards on the US Highway Construction Industry, ARTBA, (May, 1997).

Certainly, radical changes such as the new ozone standard must be based on "intelligible principles" that will facilitate a court's review. EPA failed to articulate such principles. Rather, it hides behind laudable statutory goals; at the same time, it conceals the real policy driven basis for the regulatory actions at issue.

SUMMARY OF ARGUMENT

A federal agency must explain its regulatory decisions in such a manner as to allow "meaningful judicial review." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three judge panel). *E.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta v. United States*, 488 U.S. 361, 379 (1989). The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

Under section 109(b), EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Attempting to alter a

Congressionally ratified standard for ozone, EPA adopted a new, more stringent standard without the minimal finding that the new standard was "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out by § 109(b)(1). As a result, the court of appeals was correct in concluding that EPA had not articulated "intelligible principles" in deciding whether and how to revise the ozone and particulate matter NAAQS. The court of appeals' decision is consistent with precedent and guarantees that the States and their citizens will not be without recourse to challenge arbitrary government action.

ARGUMENT

I. The Court of Appeals Was Correct In Remanding The Rulemakings to EPA In Order to Allow the Agency To Explain Its Reasoning.

The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Benzene*, 448 U.S. at 685-86. As explained below, the court of appeals was correct to remand the revised standards to the agency "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038.

Prior to EPA's challenged rulemaking, Congress set the ozone standard at .12 ppm. Section 109 of the Clean Air Act dictates that EPA's revised standard must be at a level "requisite to protect public health" with "an adequate margin of safety." Ozone itself complicates this statutory directive; it is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. 175 F.3d at 1034; 62 Fed. Reg at 38,863. *See also Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1148 (D.C. Cir. 1987) (*"Vinyl Chloride"*) (a "non-threshold" pollutant is one that "appears to create a risk to health at all non-zero levels of

emission"). Thus, in order to change the level imposed by Congress to something other than zero, EPA must explain why it settled on a specific level, and not some other, because any presence of ozone is presumed to present some threat to health or the environment.

But EPA failed to provide the court of appeals with any ascertainable standard which might have facilitated the court's review of its action. It did not identify a level of air quality that is "requisite" to protect public health. That is, EPA does not elucidate why measuring ozone at .08 ppm is requisite while other levels – for example, .07 ppm or .09 ppm - are not. EPA did not explain how the level it chose presents "an adequate margin of safety." The court of appeals carefully reviewed the administrative record and found that EPA's three primary reasons for its new NAAQS amounts to nothing more than a reflection that lower levels moving towards zero "are associated with lower risk to public health." 175 F.3d at 1035. Given that ozone is created naturally in the environment and that the results of EPA's standardless revision have the potential of affecting nearly every aspect of modern life, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants, the court was entirely correct.

The court of appeals decision to remand was not novel or drastic. Indeed, it is entirely consistent with this Court's jurisprudence. As Chief Justice Rehnquist has explained the nondelegation doctrine serves important functions:

First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the

delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

This case does not involve the first or second components of the Chief Justice's narrative. The court of appeals has not determined that § 109 delegated too much power to a federal agency, *e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935), or failed to set forth standards to constrain agency discretion. Rather, this case involves the final component - the court deployed the nondelegation doctrine as a tool of statutory construction to prevent a federal agency from interpreting its delegated authority so broadly as to give it unfettered, and virtually unreviewable, discretion.

The court of appeals' decision is entirely consistent with its own precedent. That court has not hesitated to require federal agencies to explain their reasoning in order that such reasoning could be reviewed. *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S.Ct. 58 (1999) (remanding for EPA to determine what risks are tolerable); *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (remanding lockout/tagout regulation so that OSHA could articulate principles constraining its application of rulemaking authority under the OSH Act), *on remand*, 37 F.3d 665 (D.C. Cir. 1994) (approving regulations because agency supplied sufficient list of principles).

The court of appeals decision also is workable. EPA itself admits in its Petition for Certiorari that it might be able to discern such intelligible principles under § 109. For

example, EPA calls attention to the Clean Air Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," and which requires it to consider the "public health," and not "individual health." Petition at 15.

In short, EPA did not articulate intelligible principles in deciding whether and how to revise the NAAQS. EPA should not be free to ratchet its standards ever more stringently based solely on whim or conjecture. This Court should affirm the court of appeals and require that EPA explain its reasoning why its new standard is required.

II. EPA's Interpretation of § 109 of the Clean Air Act Leads to Absurd and Unjust Results.

Presented with two possible interpretations of § 109 – one that allows EPA virtually unlimited discretion to alter the ozone NAAQS and one that precludes it - the court of appeals was obligated to interpret it in a way that avoids an absurd and unjust result.

This Court has long held that where a statute is susceptible of more than one interpretation, a court must avoid an interpretation that leads to an absurdity or an unjust result, if an alternate, reasonable interpretation may be found:

If a literal construction of the words of a statute be absurd, the act must be so constructed to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.

Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed

that the Legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (7 Wall. 482) (1869).

In this case, the court of appeals' interpretation of § 109, which precludes EPA from implementing new air standards without adequately explaining why, avoids absurd and unjust results. Indeed, following EPA's reasoning to its logical conclusion, it is not difficult to ascertain the absurdity of altering the existing standards for ozone without such an explanation. First, as explained above, ozone is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. Without being required to explain why its new standard is "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out in § 109, EPA conceivably is free to ratchet its standard ever more stringently based solely on some incremental health risk. Such a result could have, in practical terms, devastating social and economic consequences. As explained above, both the natural environment and activities involving nearly every aspect of modern life result in emission of the precursor elements for ozone, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants. In light of the controls States are required to implement for nonattainment areas, the consequences of setting an exceedingly stringent ozone NAAQS are not hard to conceptualize. They include reduced economic development, wholesale reduction of business activities, with the attendant increase in unemployment, higher production and transportation costs, which will be passed on to the consumer, higher utility costs and/or reduction in electrical supplies, with attendant health consequences for those without adequate climate control, and limitations upon the use of personal automobiles. Surely Congress did not intend EPA to exercise such power without identifying a standard against which a court might gauge its merit.

The lower court's decision in *International Union* illustrates the point. There OSHA issued new regulations requiring that employers install safety devices on machinery that could suddenly move and injure workers. Employers were required to install locks to keep the machines from starting or post warning tags. 938 F.2d at 1312. In remanding the standard to OSHA, the court was particularly wary of the agency's reliance on incremental improvement for workplace safety as justification for the regulation. "The upshot is an asserted power, once significant risk is found, to require precautions that take the industry to the verge of economic ruin (so long as the increment reduces a significant risk) . . . or to do nothing at all. All positions in between are evidently equally valid." 938 F.2d at 1317 (citations omitted). Moreover, the court recognized "the power to vary the stringency of the standard is the power to decide which firms will live and which will die. At the simplest level, for example, compliance may involve economies of scale, so that a tough standard will erase small, marginal firms and leave the field to a small group of larger ones." *Id.* The Court remanded the standard to OSHA and upheld it only after remand when OSHA returned with a "Supplemental Statement of Reasons" for the regulation, which included significant risk, feasibility, and cost-effectiveness. *International Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994).

The court's concerns in *International Union* are equally applicable to the case at bar. Like the potential power asserted by OSHA in *International Union*, EPA's assertion of authority in this case allows it to adopt any level of ozone with "[a]ll positions in between are evidently equally valid." From a practical standpoint, EPA would have the power to decide which communities will remain vibrant and growing and which will not simply by picking a number.

III. EPA Must Consider Costs and Other Social and Economic Factors When It Identifies a Level of Ozone That Is "Requisite" To Protect "Public Health."

For the reasons set out above, *Amici* submit that the court of appeals was correct in remanding the ozone and particulate matter standards to EPA in order to articulate "a determinate standard on its own." 175 F.3d at 1038. If the Court affirms the court of appeals on this issue, *Amici* further submit that EPA must be able to consider social and economic factors and indirect public health effects forclosed by the court of appeals decision in *Lead Industries Asss'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980.) The cross-petitioners in Case 99-1426 have already submitted detailed briefs on this issue and *Amici* will not repeat those arguments here. In short, "a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost." *Benzene*, 448 U.S. at 670. *Amici* fully support the positions stated in the briefs submitted by the States of Ohio, Michigan, and West Virginia and the American Trucking Associations.

CONCLUSION

EPA's rulemaking in this case stands as a stark example of a federal agency's unconfined and vagrant use of delegated power. The court of appeals should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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